

Seeking Justice at Guantanamo Bay

By LCDR Rich Federico
Office of Military Commissions – Defense

The eyes of the world remain on Guantanamo Bay, where the JAG Corps legal community continues to shine in the mission of seeking justice in the military commissions. The unique and challenging assignment to the Office of Military Commissions – Prosecution, Defense, Convening Authority, and Judiciary – requires lawyers and paralegals to wrestle with novel legal issues on cases of extreme complexity, while operating under the microscope of the international media.

Historically, military commissions were a tribunal of military necessity, dating back to boards convened by General Washington to try spying offenses during the Revolutionary War. The current military commissions, created after 9/11 to try detainees at Guantanamo Bay, have met repeated challenges to determine whether they adhere to modern legal standards.

After lying dormant since World War II, military commissions were resurrected by President Bush on Nov. 13, 2001, to try non-citizens for violations of the laws of war. In 2006, the Supreme Court ruled on a historic challenge filed by retired judge advocate, LCDR Charlie Swift, on behalf of a Yemeni detainee alleged to have been the driver for Osama bin Laden. In *Hamdan v. Rumsfeld*, the Supreme Court held that the military commissions created by President Bush lacked power to proceed as they violated both the Uniform Code of Military Justice and the Geneva Conventions. In response to the *Hamdan* decision, Congress passed the Military Commissions Act (MCA) of 2006, marking the first time in our history that military commissions were created by statute. In September 2006, President Bush ordered the “high-value” detainees be transferred to Guantanamo for

trial by military commission. In 2008, many more cases were referred for trial, including a capital, joint trial for the five men alleged to be responsible for the 9/11 attacks. At this time, the military commissions were designated as the top legal services priority within the Department of Defense, which greatly increased manning at all OMC offices for both attorneys and paralegals.

On Jan. 22, 2009, President Obama signed Executive Order 13492, which ordered the Guantanamo detention facility to be closed as soon as practicable, halted all military commission cases, and ordered a review of the case of every detainee. Many of the cases referred for trial remained in litigation throughout 2009, as several hearings were held to interpret the scope of the Order and to resolve other pending motions. Some of those cases remain ongoing today and are scheduled for trial at Guantanamo Bay in the near future. Also in 2009, Congress amended the MCA to provide more rights to the accuseds, which also required a revision of the Manual for Military Commissions. Many of the rules differ from their counterparts in the Rules for Courts-martial, or incorporate legal norms from Article III courts and international law.

Practicing law in the military commissions is a unique experience. First, many of the legal issues are novel. With few cases serving as precedent, these cases require counsel and paralegals to engage in creative thinking and a robust research and writing practice on areas of the law atypical of court-martial practice, including constitutional, international, and administrative law.

Second, OMC is a joint environment, where it is not uncommon for each case to involve service members from every branch of service. Every service differs in its military justice culture and practice, so personnel learn from one another as they merge their experiences and procedures into one system.

Third, military commission cases are far more complex

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A courtroom sketch from a pretrial motions hearing in the 9/11 case on at Guantanamo Bay.

than a typical court-martial, which challenges attorneys and paralegals at OMC to be at their best. For one, the amount of information relevant to each case is exceedingly voluminous, making the discovery process extremely difficult for both the prosecution and defense. The legalman assigned to OMC have learned new skills, as they must navigate the latest case management software to ensure discovery is organized and usable for the attorneys.

Another issue common to every military commission case is that much of the relevant information is classified, as it was initially gathered for intelligence, not law enforcement purposes. Litigating with classified information adds an additional layer of complexity and often slows the pace of the case. Prosecutors must work with various agencies to do classification reviews on information and to seek to declassify as much information as possible, making the information easier to produce in discovery or to use at trial. Military Judges are tasked with balancing the rights of the accused versus the need to protect national security information. All persons at OMC are ultimately responsible for the safeguarding of classified information, which means they all must be educated on the rules and maintain strict vigilance to ensure they are applied correctly.

On the defense side, counsel are detailed to represent men who are generally alleged to be the enemy or supported terrorist organizations. Unlike the sailor accused of violating the UCMJ, many of the detainee accused have

no previous exposure to or familiarity with the American legal system, and may not understand the basic legal concepts that are inherently known and recognized in our country. To develop trust between lawyer and client, defense counsel must overcome culture and language barriers in an environment where many clients have a general distrust of military lawyers.

Investigating and preparing military commission cases also requires OMC personnel to travel extensively, as much of the relevant persons and places stretch around the world, including active combat zones. In search of evidence, OMC has traveled to such places as Yemen, Bosnia, and Afghanistan to ensure they are diligently investigating their cases.

Finally, the location of the trials – Guantanamo Bay – also adds to the challenge. Counsel and paralegals are routinely shuttling between offices in Washington D.C. and Guantanamo to review evidence, meet with clients, or attend hearings. It is an expeditionary legal practice that requires organization and patience.

In a system that for years has been slowed by uncertainty, one constant has been the dedication and professionalism of the JAG Corps legal community tasked with the OMC mission. Regardless of the future of military commissions, the OMC experience has been a great opportunity for judge advocates and legalman to improve their knowledge and skills, which will only build a better JAG Corps going forward. 🌟